FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 48
P430/18

Lord President
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

BILFINGER CONSTRUCTION UK LIMITED

Petitioners and Reclaimers

against

THE EDINBURGH TRAM INQUIRY

Respondent

Petitioners and Reclaimers: Borland QC, Byrne; Pinsent Masons LLP
Respondent: Lake QC, McClelland; Solicitor to the Edinburgh Tram Inquiry

12 July 2018

Introduction

[1] On 25 April 2018, the respondent refused an application by the petitioners, in terms of section 19 of the Inquiries Act 2005, to prevent publication of certain information produced by them at the respondent's request under section 21 of that Act. The information consisted of entries in monthly reports which had been submitted by the petitioners to their group headquarters during the progress of the Edinburgh Tram Project, including: project overview charts; performance sheets; weighted results with chances and risks; cost

reconciliations and forecasts; overview movements of contingencies; commentaries; approved change orders; and unapproved changes. A sample report dated May 2009, in both its original and proposed redacted form, was produced and agreed as representative.

[2] On 8 May 2018, the Lord Ordinary refused the petitioners' motion for *interim* suspension of the decision and *interim* interdict from publishing the reports. The Lord Ordinary determined that the petitioners had failed to demonstrate a *prima facie* case; albeit that the balance of convenience would otherwise have favoured the grant of the *interim* orders sought. In particular, the petitioners had failed to show that the reports contained information which, if revealed to the public, would cause the petitioners loss and damage. In this reclaiming motion, the petitioners challenge that decision. The respondent cross-appeals on the balance of convenience.

Statutory provisions

[3] In terms of section 17 of the 2005 Act, the procedure and conduct of an inquiry are such as the chairman may direct. "In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness ...". Section 18 places a duty upon the chairman to "take such steps as he considers reasonable to secure that members of the public (including reporters) are able – …(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry…".

[4] Section 19 provides for restrictions to be imposed on disclosure or publication of any evidence or documents by means of a "restriction order". Such an order must specify only such restrictions "(a) as are required by any statutory provision, enforceable EU obligation or rule of law, or (b) as the…chairman considers to be conducive to the inquiry fulfilling its

terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4)." Those matters are:

> "(a) the extent to which any restriction on…disclosure or publication might inhibit the allaying of public concern;
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> (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
>
> (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
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> (d) the extent to which not imposing any particular restriction would be likely –
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> (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or
>
> (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others)."

"Harm or damage" includes damage caused by disclosure of commercially sensitive information.

[5] Section 37 confers immunity from suit on members of inquiries in respect of acts done in good faith in the purported execution of their duties.

Background

[6] The Edinburgh Tram Project was a proposal which, in its final form, was to construct a tram line from Newhaven, up Leith Walk, through the city centre and on past the Gyle to the airport; a distance of some 11.5 miles. The cost was estimated at about £500 million, of which the vast majority of funding was to come from the Scottish Government. A contract for the work was signed in 2008 whereby a consortium (BSC), comprising the petitioners, Siemens plc and a Spanish company (CAF), were to build the line. The petitioners were responsible for the civil engineering works and Siemens for the rail and electrical works. The project managers were Transport Initiatives Edinburgh (TIE), a company wholly owned by the City of Edinburgh Council. The work was bedevilled with disputes and delays. By

the time the line opened to the public in May 2014, the length had been substantially reduced to between the airport and York Place (8.7 miles) and the cost had spiralled to something in the region of £1 billion. Shortly after the opening, the Scottish Government announced that a public inquiry would be held to scrutinise the project.

[7] In November 2014, what had been a non-statutory inquiry was changed to one under the 2005 Act. This was, according to the chairman (Lord Hardie), because of a lack of co-operation by some of those involved. The respondent's remit remained unchanged and is:

> "To inquire into the delivery of the Edinburgh Trams project …, from proposals for the project emerging to its completion, including the procurement and contract preparation, its governance, project management and delivery structures, and oversight of the relevant contracts, in order to establish why the project incurred delays, cost considerably more than originally budgeted for and delivered significantly less than was projected through reductions in scope.
>
> To examine the consequences of the failure to deliver the project in the time, within the budget and to the extent projected.
>
> To otherwise review the circumstances surrounding the project as necessary, in order to report to the Scottish Ministers making recommendations as to how major tram and light rail infrastructure projects of a similar nature might avoid such failures in future."

[8] At a preliminary hearing on 6 October 2015, at which the petitioners were represented as core participants, the chairman expressed his concerns about the mass of documentation which, it was estimated, would be potentially relevant. He advised that much searching through this material would be needed. He continued:

> "While it is anticipated that the strategy will result in the identification for analysis of the most significant documents ... some of the Core Participants may consider that there is additional relevant material that has either not been identified or has been excluded through the review process that we have adopted. They may also wish other documents to be included in the material available to the Inquiry to reflect their particular interests.
>
> So an important role for Core Participants will be to draw to the attention of the Solicitor to the Inquiry any documents that they consider to be of significance that have been omitted. As we move forward, I would encourage parties to fulfil those

> obligations to ensure that their interests and the interests of their clients are adequately represented in an Inquiry that is shown to be thorough and balanced."

[9] As the inquiry progressed, the respondent developed a system designed to comply with the statutory duty to secure that the public had access to the documents produced by placing some of these on the Inquiry's public website. The distribution of some material was restricted by being put on another website, namely "Haymarket", which is accessible only by core participants.

[10] On 5 December 2017 the petitioners' former project director, namely MF, gave evidence about the petitioners' reporting methods; notably the sending of monthly reports to the petitioners' headquarters in Mannheim. He had earlier mentioned these reports in his witness statement. He testified that the reports were:

> "very similar reports which we do basically on a monthly basis with TIE to (*sic*) that time. I think you have seen these, and they are basically with some addition of executive summary or whatever, basically the same reports. But they must be in Germany."

The reports had not been produced to the respondent. On 11 December 2017 the respondent requested sight of them. On 17 January 2018 the petitioners asked to lodge only redacted versions, but this request was declined. On 6 February 2018 the respondent issued a notice under section 21 of the Act requiring production of the reports. The material was produced on 12 February. On 1 March the respondent intimated that it intended to upload the materials to the Haymarket database, thus making them available to the core participants.

[11] There had previously been an application by Siemens to restrict publication of certain material produced by them. This was granted on 22 June 2017. The petitioners describe this in the following way:

> "9 … The subject of the Siemens Application ... was, *so far as the Petitioner is aware,* commercially sensitive and confidential pricing information relative to Siemens in

> respect of the Edinburgh trams project. *So far as the Petitioner is aware,* the Chairman granted the Siemens Application, and did so having regard to the risk of harm to Siemens if the information was disclosed to their commercial competitors or the public at large. Thus, *as the Petitioner understands it*, the Chairman reached the decision he did relative to the Siemens Application on account of the commercially confidential nature of the pricing information contained within the Siemens documentation at issue.
>
> 10 … Importantly, the Siemens Application was, *so far as the Petitioner understands it*, made on substantively the same basis as the Petitioner Application… As averred, *so far as the Petitioner understands it*, the Chairman reached the decision he did relative to the Siemens Application on account of the commercially confidential nature of the pricing information contained within the relevant Siemens documentation"
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> 23 … *So far as the Petitioner understands it*, the Chairman has made a … restriction order in favour of Siemens… in relation to exactly the same kind of information as the Petitioner wishes to prevent the disclosure of… There is no proper justification for the proposed unequal treatment of the two different parts of [the consortium]. The basis for the Siemens Application, *so it is understood*, was the same as that of the Petitioner Application…" (emphases added).

The repeated failure to aver the content of the Siemens' application and the respondent's reasoning for granting that application as fact, rather than being the subject of the petitioners' awareness or understanding, is peculiar. This is especially so given that Siemens had provided the petitioners with a copy of their application before the petitioners presented this petition; even if it was on condition that, although they could refer to its content, they could not lodge it with the court.

[12] On 12 March 2018, the petitioners made their own application. In the petition it is described in summary, as follows:

> "11 … The Petitioner Application explained clearly, and in detail ... the confidentiality and sensitivity of the Confidential Information, as well the (*sic*) very real risk of significant harm were the information to be disclosed publicly. The Petitioner Application was supplemented by an affidavit (*sic*) from two senior Bilfinger group legal counsel ... [T]he Petitioner detailed the harm which would follow disclosure of the Confidential Information ... [T]he Petitioner identified that the disclosure of the reporting methodology of the Petitioner would amount to disclosure of a trade secret. The foregoing information has at the present time a material commercial value to the Petitioner, and thus to its competitors ... Were the Confidential Information (or the methodology) to become public, there is a real and

> substantial possibility – if not probability – of the Petitioner's competitors using it to undercut the Petitioner on price when tendering for construction projects ... the Confidential Information (including the methodology) could be used to the material disadvantage of the Petitioner, and other members of the [petitioners'] group, by prospective employers to whom the Petitioner, or other group members, tender for work."

The application's reference to the Siemens' application was in the following, limited form:

> "5. CONSISTENCY IN APPROACH – SIEMENS' EXPERIENCE
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> [The petitioners are] aware that other core participants (in particular ... Infraco partner Siemens), have successfully made applications for restriction orders under section 19(2)(b) of the Act. We refer to the document ... which has been redacted by the Inquiry and to the Inquiry transcript ... where this issue was raised during the evidence of [MF].
>
> 5.1 [The petitioners] respectfully request[s] that [they are] afforded the same consideration as that shown to other core participants in the Inquiry's determination of this application."

Decision of the respondent

[13] The respondent determined that: the reports were relevant to its terms of reference; they were sufficiently material that restriction of publication might inhibit the allaying of public concern; and there was a strong public interest in their release in order to contribute towards an understanding of the reasons for the conclusions which the inquiry might reach. Whilst acknowledging the public interest in the prevention of harm due to the release of commercially sensitive information, the respondent was not satisfied that the redactions sought contained information, the disclosure of which would give rise to a risk of harm or damage. In particular: (i) the application was at a high level of generality with little or no specification (with examples) of why, or to whom, the information was commercially sensitive; (ii) specification of the type of harm or damage was similarly lacking; (iii) it was not obvious that the information was not simply of a type, largely relating to income and expenditure, that might be reported in any large infrastructure project; (iv) it was not

obvious that there was anything commercially sensitive in the way in which the information was presented; (v) there was little or no explanation as to why the information may be relevant to other projects, particularly given the passage of time; (vi) the information, and the way it was presented, would have been available to individuals no longer employed by the petitioners and it was unrealistic to suggest that it remained wholly within the petitioners' control. The reports had been obtained by witnesses, neither of whom worked for the petitioners' group; and (vii) given the lack of explanation on why the method of reporting differed from that carried out by others, it was not accepted that there was any likelihood that the data would be misunderstood in such a way as to cause financial harm or damage to the petitioners.

[14] In relation to the Siemens' comparison, the respondent said:

> "Does the applicant mean that the Inquiry is not giving the Application the same consideration, if the Inquiry reaches a different conclusion from applications by others? The success, or otherwise, of other applications cannot be the test… Each application is determined objectively on its own merits and having regard to the particular circumstances of each case."

Apart from the redaction of the names of certain individuals, the application was refused.

Opinion of the Lord Ordinary

[15] The Lord Ordinary was aware that, if he held that no *prima facie* case had been made out and publication followed, refusal of the *interim* orders would effectively determine the petition. Nevertheless, he concluded that no *prima facie* case had been demonstrated. It could not be said that the decision was one that no inquiry could reasonably have reached on the basis of the material presented. The respondent had to be satisfied that the information was commercially sensitive. It was not obvious that either the substantive content of the reports or the manner of its presentation was commercially sensitive. No

adequate explanation had been given of why or to whom the information was commercially sensitive or of the type of harm or damage that might be suffered following publication. The application:

> "was at a high level of generality with little or no specification, and no examples, of either the commercial sensitivity of the material or the anticipated harm… It did no more than assert without explanation that the material in the reports and their methodology were commercially sensitive."

There was no description of the material or its internal uses, or an explanation of how publication might benefit the petitioners' competitors. There were inconsistencies in the petitioners' position: on the one hand, disclosure was said to enable competitors accurately to estimate their rates and profit margins; on the other hand, it was said that damage would be caused because the information was insufficient to enable accurate estimates to be made.

[16] The Lord Ordinary had some sympathy with the argument that the respondent had rejected the application on the basis that the information was already available to individuals no longer employed by the petitioners' group. If the information or methodology were commercially sensitive, then it was likely to be subject to legal or contractual protection. This issue was not, however, central to the decision, which was "based primarily upon the [petitioners'] failure to satisfy [the respondent] that the information was commercially sensitive". The statements of witnesses had not contained anything additional to the application. The petitioners had failed to overcome the statutory presumption in favour of publication.

[17] The petitioners had acknowledged that, although a restriction order had been made in relation to Siemens, they were unaware of the underlying material. They nevertheless maintained that the two core participants were in the same position. The petitioners' averment that there was no justification for unequal treatment was "no more than an

unsubstantiated assertion". The same applied to the petitioners' related submission, that their contention that the two applications related to the same matters, was something which raised an issue of disputed fact that could not be resolved at a hearing on *interim* orders. The respondent's duty had been to address each application on its merits. No factual basis had been pled for "the proposition that that necessitated reaching the same decision in relation to both applications".

[18] The petitioners' argument founded upon Article 1 of Protocol 1 to the European Convention did not add anything. The court was required to go beyond the domestic rules of judicial review when considering proportionality and to make its own value judgment by reference to the circumstances prevailing at the material time (*R (SB)* v *Governors of Denbigh High School* [2007] 1 AC 100). However, it could not be said that publication would constitute a disproportionate interference with the petitioners' enjoyment of their possessions, when they had failed to discharge the onus of establishing that commercial sensitivity arose at all.

[19] Had the balance of convenience arisen, the Lord Ordinary would have granted the *interim* orders. It was difficult to see how publication could cause loss and damage, having regard to the terms of the petitioners' published report in 2016 that "the group" had stepped out of the construction and civil engineering business and that the petitioners would not be seeking to acquire any new projects. However, while the risk of harm or damage to the petitioners might be remote, on the hypothesis that a *prima facie* case of commercial sensitivity had been made out, the Lord Ordinary was not prepared to assume that publication could not cause harm or damage to the group. Any such harm or damage would be irreversible and not amenable to compensation. It was not submitted that any

particular prejudice would result from delaying publication pending the outcome of the proceedings.

Submissions

Petitioners

[20] The petitioners advanced three grounds of appeal, *viz.* that the decision was: (1) contrary to the statutory duty of fairness (2005 Act, s 17(3)); (2) a violation of the petitioners' A1P1 rights; and (3) was irrational, failed to take proper account of relevant material, and took account of considerations for which there was no evidential basis.

Fairness (ground 1)

[21] The petitioners' application ought to have been given "fair and equal treatment comparable to that given to a substantively similar application …, which had previously been granted ...". The Lord Ordinary's decision was based on a misunderstanding that the petitioners' contentions in relation to the Siemens application were unsubstantiated assertions. The petitioners had seen the Siemens application and the relative decision, but had been unable to lodge the documents due to their confidential nature. The recovery of those documents was sought in the petition proceedings. The petitioners' averments that the Siemens application concerned the same type of internal financial information and the same risk of harm ought to have been taken *pro veritate.* The respondent had concluded that the information was commercially sensitive in Siemens' case but not in the petitioners' application. The applications were sufficiently similar that they ought to have been determined in the same way.

[22] The fairness of decisions in a public inquiry was ultimately to be determined by the court; whether at common law (*R (on the application of A & Ors)* v *Lord Saville of Newdigate* [2000] 1 WLR 1855, at para 38) or in terms of the statutory duty (*R (on the application of Associated Newspapers Ltd)* v *Leveson* [2012] EWHC 57 (Admin), at para 47). The Lord Ordinary erred in holding that the petitioners did not have a reasonably arguable case in this regard.

A1P1 (ground 2)

[23] It was not disputed that commercially sensitive information was a possession for the purposes of A1P1. Compatibility with the A1P1 right was a matter for the court to assess. It was not to be answered by asking whether the respondent's conclusion had been reasonable. The court had to assess the balance which the decision-maker had struck; not merely whether the decision was within a range of reasonable decisions. The proportionality test went further than that in traditional grounds of review. Consideration had to be given to the relative weight to be afforded to competing interests and considerations. Even a "heightened scrutiny" test may not be sufficient to protect Convention rights (*R (on the application of Daly)* v *Secretary of State for the Home Department* [2001] 2 AC 532, at para 27; *R (on the application of SB)* v *Governors of Denbigh High School* [2007] 1 AC 100, at para 30). The decision amounted to a disproportionate and unlawful interference with the petitioners' possessions. Such deprivation of a possession, without compensation, could only be justified in exceptional circumstances (*Lithgow* v *United Kingdom* (1986) 8 EHRR 329, para 120; *James* v *United Kingdom* (1986) 8 EHRR 123, para 54).

[24] The petitioners ought to be afforded the opportunity to argue their case at a substantive hearing on the basis of the material that may be available at that stage. It was

sufficient that the petitioners had set out, by way of averment and submission, the basis upon which it was said that the information is confidential.

Rationality (ground 3)

[25] The inquiry had failed to take express account of the evidence contained in the statement of the petitioners' witnesses, which was attached to the application. This failure to provide specific reasons for rejecting this evidence was sufficient to demonstrate that the decision was *prima facie* irrational. The Lord Ordinary accepted that the inquiry had taken account of an irrelevant consideration, namely that the information at issue was not within the petitioners' control. There was no evidential basis for such a finding. The Lord Ordinary had erred in considering that this was not a central aspect of the respondent's decision.

Cross-appeal

[26] The *prima facie* case was not an inherently weak one. Delay was not a strong factor to the contrary and, in any event, was not of the petitioners' making. The petition had been lodged on 26 April 2018. The Lord Ordinary's opinion had been issued on 8 May 2018. If the petitioners were successful, the merits of the petition could be determined in a similarly expeditious manner. In the meantime, the *status quo* ought to be preserved.

[27] It had not been suggested to the Lord Ordinary that the grant of *interim* orders would delay the inquiry or that any particular prejudice would result from delaying publication. It was no answer to say that vindication of the petitioners' rights should be denied because of any delay. It was not in the public interest for a core participant to be treated unfairly or deprived of its possessions (*R (on the application of Associated Newspapers)* v *Leveson (supra)*, at para 53). Publication was an irreversible step; if allowed, confidentiality

would be lost forever. Any damage consequent thereon would not be amenable to compensation. New material had been produced, which set out the most recent examples of construction work in which the petitioners' group were involved. This listed some eight appointments or contract awards between April 2017 and May 2018.

[28] The petitioners' profit margins were shown in the reports. That information had not changed. A competitor could calculate how the petitioners derived their preliminary, general and administrative costs and use this information either to undercut their tenders or to negotiate a price. A sub-contractor might be able to work out how the petitioners calculated contingencies. The cost reconciliation sheet had been specially developed and the *formulae* were disclosed only to the petitioners' accountants. If a sub-contractor or client could work out the *formulae* from the data, it would be very damaging. The same could be said for future clients, if they were made aware of how the company costed jobs. It could encourage them to look for a discount on the anticipated profit; the calculation of which remained the same today.

Respondent

Fairness (ground 1)

[29] The content and disposal of the Siemens application had no bearing on the issue. No details of the Siemens application had been put before the respondent or the Lord Ordinary, despite it having been seen by the petitioners. The respondent had to treat each application on its own merits. The commercial sensitivity of entries, and the risk of harm or damage, were they to be published, depended on the particular documents forming the subject matter of the application and the commercial context in which the applicant operated. Although there could be a situation in which there was such similarity that it would be of

assistance for the later applicant to refer to the earlier application, it was for the petitioners to explain why the earlier decision had a bearing on the later one. They had failed to do so. The petitioners had made explicit reference to Siemens in their application and had only asked to be "afforded the same consideration". That did not articulate why the Siemens application would be of assistance. The petitioners were afforded the same consideration. Their application was determined on its own merits.

[30] In describing the petitioners' averments as "unsubstantiated assertion", the Lord Ordinary meant that no sufficient basis in fact had been identified. The unsubstantiated assertion was that of unequal treatment of the petitioners and Siemens. It was not a sound criticism of the Lord Ordinary's reasoning that he did not treat the petitioners' averments *pro veritate.* The Lord Ordinary's decision was not inconsistent with the facts averred by the petitioners. He had been entitled to assume that the averments and submissions adequately reflected whatever material was available to the petitioners. Any error as to the basis for those averments and submissions was immaterial.

A1P1 (ground 2)

[31] This ground added nothing. It was predicated on the entries being confidential. Since the petitioners had failed to establish that, or that disclosure would present a risk of harm or damage, there could be no *prima facie* case that A1P1 was engaged. The statutory regime recognised the need for a balance between publicity and the interests of proprietors of confidential information. The discretion to strike the requisite balance was conferred on the respondent and was therefore "according to law". It had not been necessary for the respondent to strike the balance. Whilst the court was entitled to reach its own conclusion,

it was confined to reviewing the respondent's decision on the basis of the material that had been made available to it.

Rationality (ground 3)

[32] Although the decision did not refer expressly to the statement of the petitioners' witnesses, it was taken into account. The statement contained nothing that was not already in the application. It was not necessary to reject the contents of the statement or to give reasons for doing so. The contents of the application, even when taken with the statements, were insufficient. The failure to make an explicit reference to the statement was immaterial. The observation about the petitioners' control of the information, even if wrong, was immaterial. It was entirely reasonable to expect that individuals, who were party to the information, might no longer be employed in the petitioners' group. There was no evidential basis for the proposition that the material in question was likely to be subject to legal or contractual protection.

Cross-appeal

[33] The Lord Ordinary erred in holding that the balance of convenience would have favoured the grant of *interim* orders. He had failed to take account of two factors. First, he ought to have taken into account the weakness of the petitioners' case (cf *Boehringer Ingelheim Pharma* v *Munro Wholesale Medical Supplies* 2004 SC 468 at para [16]). Secondly, the grant of *interim* orders would delay the proceedings of a public body acting in the public interest (*Fergusson-Buchanan* v *Dunbartonshire County Council* 1924 SC 42, at 50). Contrary to the Lord Ordinary's Opinion, the respondent had made submissions based on the delay which would result if publication were prohibited. The inquiry would be held up pending a

decision on whether the reports could be shown to, and made the subject of possible further submissions by, the parties.

[34] The Lord Ordinary erred in his assessment of the extent to which the petitioners and their group remained active in the construction and engineering business. It was apparent from their 2016 annual accounts that "the group had stepped out of the construction and civil engineering business". The Lord Ordinary erred in giving weight to the possibility of harm to the wider group. The group has ceased involvement in civil engineering.

Decision

Fairness

[35] The court is concerned to determine the legality of the respondent's decision rather than to explore its merits. Subject to rationality, the respondent was entitled to determine, as a matter of fact and on the material provided to it, that the petitioners had failed to demonstrate that the material in the reports was "commercially sensitive information" in terms of section 19 of the Inquires Act 2005. The petitioners' contention in this process is that it could not do so because, it is said, the Siemens' application was on "substantively the same basis" as that of the petitioners. There are two major problems with this contention. First, it is not one which was presented to the respondent. The petitioners mentioned the Siemens' application and asked that their own be "afforded the same consideration". They did not advance the proposition, which they now do, that the respondent was bound to grant the petitioners' application simply because of its comparative similarity to the Siemens' case. Had this been advanced, the respondent would no doubt have addressed that issue and provided reasons for differentiating between the two. As matters stand, the court does not have the respondent's reasoning on this point because it was not advanced at

the time. In these circumstances, it is not possible to conclude that the respondent failed in its duty of fairness because different decisions were reached in respect of two different applications.

[36] Secondly, as noted above, the petitioners' averments about the content of the Siemens' application are extremely coy. They are of the most general type and refer to the petitioners' understanding or awareness of the Siemens' case, rather than its factual content. This is so notwithstanding the fact that they (as distinct from the court) have seen that application and must have been in a position to aver its terms and thus to conduct some kind of comparative analysis. The petitioners are correct to submit that, as a generality, at the stage of asking for interim orders, the court will often proceed on the basis that the petitioners' averments are true. They may, in the absence of contradictory material, have to be read *pro veritate*. However, mere relevancy is not the test. The averments have to be sufficiently specific and weighty to engage a *prima facie* case; here that the Siemens' material was of an identical, or very similar, nature and that its commercial sensitivity arose in similar circumstances. The petitioners have not set out such a case. Their averments are vague. Their submissions did not advance matters; references being made to the Siemens' application involving "commercially sensitive pricing information" or similar phrases. Although Siemens were part of the same consortium, they were engaged on a different part of the works. They may still be engaged in very similar works elsewhere. They may have been able to persuade the respondent that there was a clear danger of loss and damage, if the information were released to the public. There may, in short, be a myriad of reasons for treating the two applications differently. For these reasons, the first ground of appeal fails.

A1P1

[37] The A1P1 argument cannot succeed in the absence of the petitioners setting out a *prima facie* case that the information is commercially confidential. They require to do so against a background of the information being about ten years old, at least, and in circumstances in which the petitioners' annual group accounts indicate that they have withdrawn from civil engineering projects of the type under consideration. Furthermore, the testimony given to the respondent by MR (*supra*) was that the information provided in the reports to Mannheim was "basically the same" as had been sent to TIE.

[38] Again, the petitioners plead that the court must take what they have averred *pro veritate* at this interim stage. That is, once more, subject to the qualification that the information being provided to the court must be sufficiently specific for the court to hold that the respondent's conclusion, that the information was not demonstrably commercially sensitive, amounted to an error of law; applying the standard tests for judicial review on this particular point (cf proportionality). The court has considered the terms of the application. Having done so, and subject to considerations of rationality (*infra*), it agrees with the Lord Ordinary that there is no such error disclosed in the respondent's reasoning. Indeed the Lord Ordinary reached the same conclusion having reviewed the material.

Rationality

[39] The decision taken by the respondent was an incidental, although no doubt important, one taken in the wider context of a public inquiry. The respondent has provided a written note of the reason for the refusal of the petitioners' application. In general terms, the reason was because the application lacked the degree of specification required to persuade the respondent of its merit. The respondent illustrated this under reference to

seven matters. There was no requirement for the respondent to state specifically that it rejected the content of the supporting witnesses' statements. The statement no doubt justified the averments made, but, as the Lord Ordinary also found, there was nothing substantial in the statement that was not already in the statements of fact in the petition. The court will normally assume that a decision maker has taken account of the material put before him in the absence of material to suggest otherwise. The failure to make an express reference to something which is designed to support the principal averments does not fall into that category. It is relatively apparent that, in reaching its decision, the respondent had in mind what was averred and hence what the petitioners' witnesses were saying.

[40] The Lord Ordinary had some sympathy for the view that the respondent's reference, to the information being available to individuals who were no longer employed by the petitioners' group, was an irrelevant consideration given that such employees would be the subject of contractual restraints. He held, however, that it was not a material one. Whilst the court agrees with that reasoning, in fact the respondent was correct in its view that the information would be available to those no longer employed by the petitioners' group, since the witness himself fell into that category. It is not an unreasonable assumption that there will be many former group employees, who will have been involved in many projects involving similar information and reports, who have moved on to work for other concerns. Whatever the contractual restraints, historical information on the petitioners' working estimates and margins of the type under consideration would be likely to be held by many working elsewhere in the civil engineering field. For all of these reasons the rationality challenge fails.

Cross Appeal

[41] The Lord Ordinary states that it was not submitted that any particular prejudice would result to the respondent from delaying publication of the material pending the conclusion of the petition proceedings. This may seem somewhat surprising, and it was contrary to the respondent's submissions. Although the respondent's decision to publish, at least on the Haymarket site, was made on the eve of the date for closing submissions, if the reports are of importance, the possibility that they, if disclosed to the core participants, could be made the subject of further submissions must remain. If they are at all significant to the terms of reference, which the respondent has held to be the case, it is difficult to see how the inquiry can proceed at all pending a resolution of the issues raised in the petition. Nevertheless, the Lord Ordinary did not consider that any such delay would override the other considerations to be taken into account in determining the balance of convenience.

[42] If a *prima facie* case had been made out, that would have presupposed that the reports did contain commercially sensitive information, the disclosure of which could cause the petitioners irreparable loss and damage. Compensation would not be recoverable from the respondent, since immunity from suit was statutorily conferred. This was, and is, an important consideration which, the Lord Ordinary was entitled to hold, tipped the balance in favour of granting the *interim* orders. In so determining, there is no indication that the Lord Ordinary failed to take into account the weakness of the petitioners' case. He made a specific reference to one aspect of that weakness when referring to the entry in the petitioners' annual report regarding their continuing interest in civil engineering projects.

[43] The determination of where the balance of convenience lies is a matter primarily for the discretionary judgment of the court of first instance having regard to all the

circumstances. The court would normally only interfere with the exercise of that discretion on one or more of the conventional grounds for doing so. None appear to exist in this case.

Conclusion

[44] The court will refuse the reclaiming motion and the cross-appeal and adhere to the interlocutor of the Lord Ordinary dated 8 May 2018.